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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

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BRIEF FOR PETITIONER UNITED AIR LINES, INC.

On November 1, 1976, this Court granted the Petition of United Air Lines, Inc. (hereinafter "United") for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the captioned case. This is the brief for United.

OPINIONS BELOW.

The Memorandum Opinion of the District Court for the Northern District of Illinois dated April 9, 1975 is officially unreported. A copy appears in the Appendix at page 17. The first opinion of the Court of Appeals dated January 29, 1976 is officially unreported. A copy appears in the Appendix at page 21. The opinion of the Court of Appeals after rehearing is reported at 534 F. 2d 1247 (7th Cir. 1976). A copy appears in the Appendix at page 33.

JURISDICTION.

The final judgment of the Court of Appeals after rehearing was entered on April 26, 1976. United's petition for rehearing with suggestion for rehearing *en banc* was denied June 7, 1976 (A. 41). Jurisdiction is conferred on this Court by 28 U. S. C. Section 1254(1).

STATUTE INVOLVED.

The Civil Rights Act of 1964 (hereinafter, the "Act"), 42 U. S. C. § 2000e, *et seq.*, specifically, Section 706(d) thereof (42 U. S. C. § 2000e-5(d)) as it existed prior to the 1972 amendments is the statute involved.¹ In 1972, Section 706(d) was relettered Section 706(e) and is currently in effect as such. The original wording of Section 706(d) and the wording of this Section as relettered in 1972 appear below.

Sec. 706(d). [42 U. S. C. § 2000e-5(d)]. A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. [Sec. 706(d) prior to March 24, 1972.]

Sec. 706(e). [42 U. S. C. § 2000e-5(e)]. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employ-

1. Public Law 92-261 amended the Act effective March 24, 1972. Evans' resignation and rehire both occurred before the 1972 amendments became effective.

ment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. [Sec. 706(d) as relettered Sec. 706(e) effective March 24, 1972 and as currently in effect.]

QUESTIONS PRESENTED FOR REVIEW.

Does the reemployment of a former employee with new date-of-hire seniority under a neutral seniority system permit the resurrection of that employee's time-barred claim for loss of seniority and pay arising from termination of that employee's prior employment?

Are the collateral or lingering *effects* of a prior act of discrimination *in themselves* acts of discrimination against an employee, permitting the filing of a charge at any time in the future regardless of how long ago the prior act of discrimination occurred?

STATEMENT OF THE CASE.

This is an action brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, *et seq.*, by Carolyn J. Evans (hereinafter "Evans"), a former and subsequently rehired stewardess with United, to recover seniority and back pay lost as a result of her separation from employment as a stewardess in February of 1968 (A. 4). Jurisdiction was based on Section 706(f), 42 U. S. C. § 2000(e)-5(f), of the Act.

Evans was first hired by United as a stewardess in November, 1966 and continued that employment relationship until February, 1968, when she involuntarily resigned in anticipation of her marriage and pursuant to United's then existing "no-marriage" rule that applied to stewardesses (A. 5).² As a result of her resignation, all aspects of her employment relationship with United terminated, including seniority, pay, vacations, travel passes, etc. Evans did not protest her involuntary resignation or the loss of these employment benefits by filing a charge with the Equal Employment Opportunity Commission ("EEOC") or any state agency within ninety days of her separation or at any time during the next four years.

On February 16, 1972, Evans made application and was accepted for employment by United as a new stewardess (A. 5). She was sent to the same training school as other new hires and was graduated March 16, 1972 (A. 5). She commenced work as a new stewardess with a seniority date reflecting her date of hire in 1972, the same as other new hires with whom she graduated (A. 5). In all respects, Evans was treated as a new hire and granted the same benefits and conditions of employment as other new hires.

On February 21, 1973, five years after her resignation in 1968 and approximately one year after her rehire as a new stewardess, Evans—for the first time—filed a charge of discrimination under Title VII complaining, in substance, that United unlawfully terminated her in February, 1968 and currently refused to restore the seniority she lost when her res-

2. This policy of requiring stewardesses to remain unmarried was discontinued by United on November 7, 1968. On the same date, United, by letter agreement with the collective bargaining agent for its stewardesses, agreed to reinstate those stewardesses, upon timely application, who had been terminated under the no-marriage rule and who had filed a grievance under the collective bargaining agreement or a charge of discrimination with the Equal Employment Opportunity Commission or an applicable state agency. Evans had filed no such protest concerning her separation from employment although it had occurred eight months before and, therefore, she did not qualify for reinstatement under the letter agreement of November 7, 1968.

ignation was accepted in 1968 (A. 4-5). On August 29, 1974, the EEOC issued Evans a "right to sue" letter and, on September 4, 1974, Evans filed her complaint in the United States District Court for the Northern District of Illinois, Eastern Division (A. 5).

In her complaint, Evans alleged that she had been discriminated against on the basis of sex when United, by reason of its no-marriage rule, forced her to resign her employment as a stewardess in 1968 (A. 7). To avoid the application of any time limitations for her failure to file any previous charge of discrimination, Evans asserted the existence of an alleged continuing violation in that the failure to credit her with her former seniority, now that she was back in an employment relationship, currently discriminated against her on the basis of sex by depriving her of the higher wages and benefits she would have had if that seniority had been credited to her (A. 7).

United took the position that the act of discrimination which caused her original 1966 seniority to cease was her forced resignation in 1968 pursuant to the then-existing no-marriage rule. It was this action in 1968 that terminated her employment with United and terminated all benefits, including seniority, associated with that employment. United maintained that this was a completed and final act for which a timely charge of discrimination could have been filed. United pointed out that there was a four year period in which there was no employment relationship between Evans and United. The fact that Evans was subsequently hired as a new employee and given a new seniority date in 1972 under an admittedly neutral date-of-hire seniority system did not alter the fact that her former seniority had been lost when her former employment was terminated in 1968. United moved to dismiss the complaint on the ground that timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to filing of a civil action under Title VII and that Evans' claim for restoration of the seniority she lost in February, 1968 was untimely in that any charge relating

to that loss should have been filed within ninety days of that event, not five years later (A. 15).

The District Court granted United's motion to dismiss (A. 16). By memorandum opinion entered April 9, 1975, the District Court concluded that "Evans . . . has not been suffering from any 'continuing' violation. She is seeking to have this court merely reinstate her November, 1966 seniority date which she lost solely by reason of her February, 1968 resignation" and that "United's subsequent employment of plaintiff in 1972 cannot operate to resuscitate such a time-barred claim" (A. 17-18).

On appeal to the Court of Appeals, Evans took the position that the District Court erred in dismissing her Complaint since the violation complained about was allegedly a "current and continuing" violation of the Act; *i.e.*, Evans was presently holding a seniority position as a stewardess inferior to the seniority position she would have had if her 1966-68 seniority had been credited to her on rehire. In short, Evans continued to argue that the Company's action in requiring her to resign in 1968 was an unlawful act of discrimination and that United was and is unlawfully perpetuating the effects of that past discrimination and actively enabling that prior discrimination to reach effectively into the present.

United's position before the Court of Appeals remained the same; *i.e.*, the actionable injury to Evans under the Act was her termination from employment in February, 1968, at which time she lost her seniority and all other benefits associated with that employment. Since her complaint concerned that loss of seniority, it was from the date of that loss that the time limit for filing a charge began to run—but that time limit had long since passed.

On January 29, 1976, the Court of Appeals, in a divided opinion, affirmed the District Court's dismissal of the Complaint (A. 20). The majority of the Court concluded that United's seniority policy is not discriminatory in itself with respect to sex and that such a policy, which is neutral, cannot be said to

perpetuate past discrimination, long since discontinued, in the sense required to constitute a "current" violation of Title VII. The majority of the Court stated (A. 27-28):

" . . . If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termination alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period."

The dissenting judge disagreed, stating that he believed "continuing discrimination" to be present since failure to credit Evans with back seniority as a current employee gives "collateral effect" to the past act of discrimination (A. 29).

On February 12, 1976, Evans petitioned the Court for a rehearing. The EEOC shortly thereafter filed a brief as *amicus curiae* in support of that petition. While the petition was pending, this Court issued its decision in the case of *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 96 S. Ct. 1251 (March 24, 1976). Evans filed a supplemental brief instantaneously on March 30, 1976 asserting that the *Franks* decision was of controlling guidance in support of her position. On April 6, 1976, the Court of Appeals granted Evans' motion for rehearing (A. 31) and on April 26, 1976 reversed its February 12 decision (A. 32). Its reversal was based upon its interpretation of the *Franks* decision (A. 39).

United petitioned the Court for rehearing with a suggestion for rehearing *en banc* on May 10, 1976. That petition was rejected on June 7, 1976 (A. 41). United then filed a Petition for a Writ of Certiorari, which this Court granted on November 1, 1976.

SUMMARY OF ARGUMENT.

Section 706(d) of the Act stated that charges of discrimination under the Act must be filed within ninety days of the alleged unlawful employment practice.³ It is settled law that such timely

3. Illinois law did not cover sex discrimination in 1968; hence the ninety day provision is the applicable provision.

filing constitutes a jurisdictional prerequisite to institution of a lawsuit.

In this case Evans is claiming that the seniority she accrued prior to her involuntary resignation in February, 1968, should have been added to the seniority she began to accrue in February, 1972 when she was rehired as a new employee. The loss of such former seniority, however, occurred in 1968 as a direct consequence of her resignation and any claim to such seniority was lost when she failed to file a charge within ninety days of that event.

The resignation of Evans in February, 1968 constituted a final act—a complete severance of the employment relationship in every respect—and cannot properly be construed as a “continuing violation.” Prior court decisions have so held. Although there are “lingering effects” of the resignation in 1968, these “effects” do not in and of themselves constitute new acts of discrimination within the meaning of the Act for, if they were so construed, the time limits in the Act would become meaningless since every act of discrimination has some lingering effects.

The decision of the Court of Appeals after rehearing creates a conflict in the Circuits inasmuch as other Courts of Appeal have rejected the argument that the lingering effects of termination of employment are themselves acts of discrimination.

Further, the decision was based upon an erroneous interpretation of this Court’s decision in the *Franks* case, *supra*. In *Franks*, this Court held that Section 703(h) of the Act as applied to a bona fide seniority system did not preclude *as a matter of remedy* the grant of retroactive seniority in a situation in which the timely filing of the original charge of discrimination was not in issue and the court had jurisdiction over the matter. The decision in *Evans*, however, is authority for a different proposition; *viz* that a claim of discrimination is timely as long as some “collateral effects” of a time-barred act of discrimination are not rectified when a rehired employee is assigned a seniority date reflecting her new date of hire in a neutral, bona

fide, seniority system. The mere fact of rehire and the routine operation of a completely neutral date-of-hire seniority system are, therefore, permitted to convert a barred claim of discrimination into a current continuing violation permitting the filing of a charge at any time—a result clearly never contemplated by this Court in *Franks*.

ARGUMENT.

I.

The Time Limit of Section 706(d).

Section 706(d) of the Act is clear and unambiguous. Prior to the 1972 amendments of the Act, Section 706(d) provided that charges of discrimination in a state which did not have a law banning such discrimination must be filed within ninety days of the act of discrimination. As stated in Section 706(d):

“A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred. . . .”

The only change made by the 1972 amendments to the quoted language was to enlarge the ninety day period to 180 days.

It is settled law that fulfillment of the above requirement is a jurisdictional prerequisite to the filing of a lawsuit. The Court of Appeals for the Seventh Circuit recognized this in the case of *Choate v. Caterpillar Tractor Company*, 402 F. 2d 357, 359 (7th Cir., 1968) wherein the court stated:

“The requirement that a complainant must invoke the administrative process within the time limitations set forth in Section 706(d) is a jurisdictional precondition to the commencement of a court action.”

This Court, in *Alexander v. Gardner-Denver Co.*, 415 U. S. 36 (1974), agreed when it stated, in the language of Mr. Justice Powell, at p. 47, that the Act:

“... specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were

met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue 42 U.S.C. §§ 2000e-5(b), (e) and (f)".

To the same effect is *McDonnell Douglas Corp. v. Greene*, 411 U. S. 792, 798 (1973).

Other Circuits are in accord that the time limits in Title VII must be complied with to confer jurisdiction; see, e.g., *Griffin v. Pacific Maritime Assoc.*, 478 F. 2d 1118 (9th Cir., 1973), cert. denied, 414 U. S. 859; *East v. Romine, Inc.*, 518 F. 2d 332, 336 (5th Cir., 1975); *Olson v. Rembrandt Printing Co.*, 511 F. 2d 1228, 1231 (8th Cir., en banc 1975); *Revere v. Tidewater Tel. Co.*, 485 F. 2d 684 (4th Cir., 1973) and *Greene v. Carter Carburetor Co.*, 532 F. 2d 125 (8th Cir., 1976). Also, *Younger v. Glamorgan Pipe & Foundry Co.*, 310 F. Supp. 195 (W. D., Va., 1969) and *Gordon v. Baker Protective Services, Inc.*, 358 F. Supp. 867 (N. D., Ill., 1973).

II.

The Act of Discrimination in This Case Occurred in February, 1968.

United's seniority system, as it pertains to United's stewardesses as well as other employees, is a commonly used system whereby employees begin to accrue seniority when they commence work and lose seniority when employment is terminated. Seniority rights, along with other perquisites of employment such as wages and fringe benefits, are derived from the employment relationship and apply only as long as there exists an employment relationship.

When Evans was first employed by United in November, 1966, she began to accrue seniority and by the time of her resignation in February, 1968, had accrued approximately 16 months' seniority. When she resigned in February, 1968, her seniority terminated, as did all other perquisites of the em-

ployment relationship. She then became a member of the general public and stood on the same footing as other members of the general public, with the sole exception that she possessed a right, for ninety days, to file a charge with the EEOC protesting her involuntary resignation and the accompanying loss of her seniority, wages, travel passes, etc. At the expiration of ninety days, she possessed no rights whatsoever to challenge the loss of that seniority or other employment benefits.

Before her employment by United as a "new" stewardess in February, 1972, Evans concededly had no right of reinstatement to her former employment nor to any benefits attached thereto. Similarly, upon her new employment, she had no claim or rights arising out of her former period of employment since any claim to such rights had long expired. It was not until approximately one year after she was reemployed in 1972 that Evans first claimed that the seniority she accrued between November, 1966 and February, 1968, should have been added to her new seniority in 1972. According to Evans, although she admittedly had no right in February, 1972 to be reinstated to her former employment, once she resumed an employment relationship, the failure of United thereafter to add her former seniority created a new and continuing violation pursuant to which a charge could be filed at any time.

It is evident, however, that the actual act of discrimination of which Evans complains occurred in February, 1968, for that is the time she lost the 16 months' seniority which she claims. As a new employee in 1972, she could justify no more right to 16 months' added seniority than any other "new hire". The only basis on which she claims such added seniority arises from her prior period of employment—but all claims arising from that period of employment were barred ninety days after her resignation in 1968. Once barred, they could not be resurrected. Yet, this is what the Court of Appeals erroneously permitted in this case—and solely because of United's action in reemploying her.

III.

Evans' Termination of Employment in 1968 Constituted a Final Act and No "Continuing Violation" Is Involved in This Case.

Virtually every court that has had occasion to pass on the question has held that a termination of employment is a "final act" and not a continuing violation.⁴ As aptly stated in *Phillips v. Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 537-8 (D.C. W. Va. 1972), *affirmed without opinion* 474 F. 2d 1342 (4th Cir., 1973):

"It is clear that the unlawful discriminatory practice complained of by plaintiff arises out of the termination of his employment on September 25, 1969. Although plaintiff has alleged a continuing practice of discrimination in his complaint, the record before this court, aside from plaintiff's pleadings, establishes only this single act which could arguably be considered an unlawful employment practice. Plaintiff attempts to avoid the limitation period set forth in Section 706(d) by asserting that the discriminatory practice continued until July 7, 1970, when a negro was hired as his replacement. The record establishes, however, only a single act, occurring on September 25, 1969, which conceivably could form the basis of a charge under the Civil Rights Act of 1964. To hold that the alleged discriminatory termination of plaintiff's employment constituted a continuing practice of discrimination would be to negate reality. * * *

4. In addition to cases under the Civil Rights Act referred to in footnote 5, *infra*, it has also been consistently held in cases arising under the National Labor Relations Act that a termination of employment is a final act, and where the time limit for filing a charge of unfair labor practice has not been met, a complaint based upon that termination is time-barred. To permit the "effects" to be used as a basis for a subsequent complaint would result in reviving a legally defunct claim. *NLRB v. Textile Machine Works*, 214 F. 2d 929 (3rd Cir. 1954); *NLRB v. Childs Co.*, 195 F. 2d 617 (2nd Cir. 1952); *NLRB v. Pennwoven, Inc.*, 194 F. 2d 521 (3rd Cir. 1952).

In *Olson v. Rembrandt Printing Co.*, 511 F. 2d 1228, 1234 (8th Cir., 1975), the Court of Appeals for the Eighth Circuit stated that:

"... Termination of employment either through discharge or resignation is not a 'continuing' violation. . . ."

This Court, in *Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454, 95 S. Ct. 1716 (1975), recently recognized that time limits for protesting discharges are counted from the date of discharge. In *Johnson*, the petitioner was discharged on June 20, 1967. Some three and one-half years later, petitioner brought court action under the Civil Rights Act of 1866, 42 U. S. C. § 1981, alleging that he was discriminated against on the basis of his race when discharged. Since the action took place in the State of Tennessee, a one year statute of limitation was applicable to actions brought under 42 U. S. C. § 1981. Rejecting the argument that petitioner's failure to file his suit within the one year limit was excused because he had filed a timely charge under Section 706 of the Civil Rights Act of 1964, this Court stated, 421 U. S. 462-3:

"The cause of action asserted by petitioner accrued, if at all, *not later than June 20, 1967, the date of his discharge*. Therefore, in the absence of some circumstance that suspended the running of the limitation period, petitioner's cause of action under § 1981 was *time-barred* after June 20, 1968, over two and one-half years before petitioner filed his complaint." (Emphasis added.)

Significantly, this Court did not hold that petitioner's charge was timely because he "continued" to suffer the effects of his discharge. It was the act of discharge on June 20, 1967 which began the running of the applicable time limit and petitioner's claim was time-barred as a result of his failure to meet that limitation.⁵

5. See also *Revere v. Tidewater Telephone Co.*, 485 F. 2d 684 (4th Cir., 1973) affirming the District Court's denial of jurisdiction for failure of a discharged employee to file his charge with the EEOC within ninety days; *Buckingham v. United Air Lines, Inc.*,

In *Terry v. Bridgeport Brass Co.*, 519 F. 2d 806, 808 (7th Cir. 1975) the Court of Appeals stated:

"... If they [plaintiffs] believed that their termination was the result of unlawful discriminatory practices, then a charge was required to be filed within ninety days of that termination. Although the plaintiffs contend that the ninety-day limitation period is no bar because the discrimination is continuous in nature, this is not the case once employment has ended. * * *

... For such a former employee the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date. . . ."

In *Collins v. United Air Lines, Inc.*, 514 F. 2d 594 (9th Cir., 1975), the Court of Appeals for the Ninth Circuit ruled in a case involving another United stewardess who resigned because of the same "no-marriage" rule, that her lawsuit was barred because of her failure to file charges with the EEOC within ninety days of her resignation.

Except for the fact that Evans was employed as a new stewardess several years after her original employment ended whereas Collins was not, the fact situations in the two cases are almost identical. Both plaintiffs were stewardesses hired by United prior to 1968. Both resigned involuntarily because of United's no-marriage rule—Collins in 1967 and Evans in 1968. Neither filed a charge protesting her termination within ninety days following the termination. In Collins' case, she first filed her charge in 1971, some four years after her termination. In

(Continued from preceding page)

..... F. Supp., 11 FEP Cases 344, 349 (C. D. Cal. 1975); *Higginbottom v. Home Centers, Inc.*, F. Supp., 10 FEP Cases 1258, 1260 (N. D. Ohio, 1975); *Doski v. M. Goldseher Co.*, F. Supp., 11 FEP Cases 468, 470 (D. Md. 1975); *Guy v. Robbins & Myers, Inc.*, 525 F. 2d 124 (6th Cir. 1975), cert. granted 44 U. S. L. W. 3608 (April 27, 1976) and, in particular, *Kennedy v. Braniff Airways, Inc.*, 403 F. Supp. 707 (N. D. Tex. 1975) and *Turnow v. Eastern Airlines*, F. Supp., 13 FEP Cases 1227 (D. N. J. 1976), cases strikingly similar to *Evans*.

Evans' case, she first filed her charge in 1973, five years after her termination. Both Evans and Collins contended their charges were timely filed because the alleged violations were "continuing" in that United had continually denied to them privileges and benefits of employment, including prior employment seniority.

The Court of Appeals in *Collins* ruled that her charge was untimely filed since she did not file it within ninety days of her resignation. The Court of Appeals in *Evans* ruled that Evans' charge was timely even though she failed to file it within ninety days of her resignation. Answering the contention that the violation was "continuing", the Court in *Collins* said (514 F. 2d at 596):

"We cannot accept Collins' argument that her continuing nonemployment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, it is the alleged unlawful act or practice—not merely its effects—which must have occurred within the 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period.

The argument that the *effects* of a past act of discrimination rather than the act of discrimination itself constitutes a new or continuing violation of Title VII, as rejected in *Collins, supra*, was similarly rejected in a very recent decision of the U. S. District Court for the Southern District of New York rendered after this Court's decision in *Franks v. Bowman Transportation Co., supra*. In *Cates v. Trans World Airlines*, F. Supp., 13 FEP Cases 201 (S. D. N. Y., July 22, 1976), a pilot employee claimed that he would have had higher seniority benefits and standing but for the fact that his employer had a previous discriminatory policy against hiring black pilots. In 1972, some six years after his employment took place in 1966, he filed a charge with the EEOC for the first time contending, as does Evans here, that he was suffering the current effects of a prior act of discrimination. Specifically, he contended that the

failure of TWA to hire him earlier caused him to occupy a lower seniority status and to have fewer benefits than he would have had if hired prior to 1966. The Court rejected the argument that the presence of the continuing "effects" constituted new and separate events of discrimination for which a new charge of discrimination could be timely filed. As stated by the Court (13 FEP Cases at 209):

"... While Whitehead had not alleged that he was denied some benefit traceable to his low seniority status within 180 days of the filing of charges with the EEOC, the Court will construe his complaint so as to make such an allegation. Still, this does not help him state a timely claim for relief. The monthly allocation of seniority benefits pursuant to a facially neutral, date-of-hire seniority system is not the event by which an unlawful employment practice occurs for the purposes of triggering the 180 day limitations period in which to file charges. Any detriments which he may have suffered during this period are not in and of themselves fresh acts of discrimination, but are only the derivative effects of the prior policies as carried forward by the seniority system. As a case like *Collins* makes clear, it is the unlawful *act or practice* and not merely its effects which must occur within the 180 day period prior to the filing of charges with the EEOC."

IV.

The Fact That Evans Was Rehired Does Not Resurrect Her Time-Barred Claim—*Franks v. Bowman* Is Inapposite.

In its initial decision, the Court of Appeals in *Evans* recognized that Evans had been rehired by United before she filed her charge with the EEOC but held that nonetheless her claim was barred by time limits because she had not filed it within the time specified in the Act. As correctly stated by the Court in its initial decision (A. 27-28):

"... If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termi-

nation in 1968. A suit based on that termination alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period."

The cases discussed above in this brief, including *Collins, supra* and *Terry, supra*, establish that a termination is a final act and is not a continuing violation of the Act. Therefore, as the Court of Appeals correctly held in its initial decision, any claim she had "relating to the termination" would be barred.

After the Court of Appeals received and interpreted this Court's decision in *Franks v. Bowman Transportation Co., supra*, it reversed its ruling. In its second and final decision in *Evans*, the Court's reliance on *Franks* was made clear. The Court said (534 F. 2d at 1250):

"It is in the context of the *Franks* decision that we must consider whether Evans' complaint was filed within 90 days of a violation of Title VII, thus affording jurisdiction to the district court. More specifically, the issue is whether ... [Sec. 706(h)] may be used to interpose a legal bar to Evans' theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuous violation of her Title VII rights."

The Court of Appeals construed *Franks* as requiring the finding that operation of a neutral date-of-hire seniority policy to a rehired employee necessarily constitutes a current or continuing violation of the Act if the effects of some prior act of discrimination, a charge as to which act in itself has been time-barred, are carried forward. In so reading *Franks*, the Court of Appeals was in error.

Franks has no application to the real question at issue in the present case. *Franks* simply stands for the proposition that a federal court has power to *remedy* an act of discrimination by

6. United never raised the defense that Section 706(h) barred Evans' claim. It had no need to do so since Section 706(d), correctly interpreted, provided a complete defense. The Court of Appeals inserted the Section 706(h) argument as an issue, then decided that issue against United.

an award of retroactive seniority to the victim of discrimination in a situation in which the time limits for filing the complaint are met and the court has jurisdiction. *Franks* does not stand for the proposition that a federal court has jurisdiction over claims in which the time limits of the Act were not met. In *Franks*, retroactive seniority was authorized for members of a class in which the named plaintiffs had filed a timely charge. In *Evans*, no timely charge was filed. Thus, the District Court in *Evans* did not have jurisdiction over her claim to seniority arising out of her 1966-68 employment. *Franks* is inapposite.

As applied to *Evans* herself, it is not unreasonable to require that she should have taken timely steps at the time of her termination to protect her rights. It was at that point, in actually losing her job and seniority, that the "act" of discrimination occurred—the date the no-marriage rule was applied to her. It was at that point at which it could reasonably be expected that she would have sought remedial action if she felt she had been treated unfairly. Moreover, despite the discontinuance of the no-marriage rule by United in November, 1968 and despite her employment as a new hire with new date-of-hire seniority in February, 1972, *Evans* still failed to file her charge until over one year later. With ample opportunity to file a claim—with over five years passing since her termination and the loss of her former seniority—and with no ongoing pattern and practice of discrimination, it is unreasonable to so loosely construe the "continuing discrimination" concept as to permit *Evans* to resurrect those claims that were clearly time-barred.

If the Court of Appeals' broad extension of the "continuing discrimination" concept in *Evans* were to receive acceptance, then any present employee who was discriminated against in the past could wait indefinitely and file a charge any time in the future—whether five, ten, fifteen or more years later, for he would meet the criteria of *Evans* of being an employee who could be in the position of always suffering the effects of a past action of discrimination. The time limits specified in Section 706 of the Act would be meaningless.

To illustrate: Assume that an employee was discriminatorily laid-off in 1970 and remained in such status for three years. She returns to active employment in 1973 and remains an employee for thirty years thereafter and, at the end of thirty years, first files a charge of discrimination with the EEOC. (*Evans* waited one year after her return to employment.) She claims a continuing adverse effect on her pay and seniority up to the present time since under the employer's neutral seniority system, one used by almost all employers, she did not accrue seniority credit for the period of her lay-off. Under such a seniority system and under the *Evans* decision, her charge presumably would be timely for she would be currently suffering the "collateral effects" (lower rated seniority, pay, etc.) of a past act of discrimination.

Similarly, assuming that an employee was discriminatorily denied a transfer to a higher rated position in 1970, but remains an employee for thirty years thereafter and, at the end of thirty years, first files a charge of discrimination with the EEOC, her charge presumably would be timely under the *Evans* decision for she would be currently suffering the "collateral effects" (lower rated position) of a past act of discrimination.

The above examples are illustrative. The fact, however, is that in such cases and others, any period of limitations for Title VII action under Section 706 would be completely eliminated if the *Evans*' rationale were accepted. Clearly, Congress intended no such result.

Doubtless, every past act of discrimination has some future impact and continuing effects. As applied to *Evans*, although she now claims that because of her prior termination from employment a continuing adverse effect on her present pay and seniority exists, she is, in truth, suffering from fewer adverse effects than *Collins* or *Terry* who were not rehired and whose claims are barred. *Evans*, thus, results in a situation in which a former employee who is rehired and again begins to draw wages, fringe benefits and the like is given a right to the benefits

of her past employment despite her five year delay in filing a charge, whereas a former employee who is not rehired and remains adversely affected has no such rights.

The net effect of the Court of Appeals' final decision in *Evans*, thus, is to create different rights under the Act for former employees who are rehired and former employees who are not rehired. Those who are not rehired lose any claims based upon their former employment relationship unless they asserted such claims within 90 days as provided in Section 706(d). Those who are rehired have the right, under the *Evans* rationale, to assert such claims even though such claims were barred by Section 706(d) several years prior to rehire. In short, *Evans* means that the act of rehiring a former employee resurrects or revitalizes a claim already barred by time limits. This result is illogical and without support in the law. It obviously will not foster reemployment of former employees by employers, but will discourage reemployment.

Section 706(d) draws no distinction between claims by present employees and claims by former employees. Nothing in Section 706(d) permits claims to be asserted by present employees unless those claims were filed within the ninety day period from the date the act of discrimination occurred. In fact, Section 706(d) bars *all* claims not filed within ninety days, whether by present employees or not. There is no valid basis in the Act from which to draw a distinction in the application of Section 706(d) between present and former employees.

The error in *Evans* is that the Court of Appeals confuses the continuing *effects* of an act of discrimination with the *act* of discrimination itself. It does so in a situation wherein the act of discrimination was a definite and completed act, where there was a complete break in the employment relationship, where the underlying discriminatory policy has long been discontinued, where the aggrieved employee had more than ample opportunity to timely assert a claim but chose not to do so, and where (unlike other cases in which a

continuing discrimination has been found, such as in the departmental seniority cases) there is no ongoing seniority or other policy that properly can be said to have had its genesis in the original discriminatory practice or that was or is so inexorably tied to the former discriminatory practice as to represent merely a present extension of it. On the contrary, the *Evans* decision represents authority for the proposition that claims under Title VII, although previously barred by the time limitations under the Act, can at any time be "unbarred" by the mere fact of subsequent employment and the application of a completely neutral employment system, such as United's date-of-hire seniority system. As a result, it creates a license for an aggrieved person, irrespective of when the alleged discrimination occurred, to wait years before asserting a claim of discrimination, as did *Evans*. It effectively eliminates any period of limitations for Title VII actions.

CONCLUSION.

For the reasons stated above, United respectfully requests this Court to reverse the decision of the Court of Appeals and affirm the judgment of the District Court.

Respectfully submitted,

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